United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2109

To be argued by
STANLEY L. KANTOR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Original

No. 75-2109

DORIS ARMSTRONG, etc., et al.,

Plaintiffs-Appellees,

-against-

BENJAMIN WAFD, etc., et al.,

Defendants-Appellants.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

Defendants-Appellants [hereafter "defendants"] officials of the New York State Department of Correctional Services appeal to this Court from a final judgment, order and decree of the United States District Court for the Southern District of New York, (Knapp, D.J.) enjoining defendants from transferring plaintiffs from Bedford Hills Correctional Facility to Fishkill Correctional Facility without according them hearings required by Newkirk v. Butler, 499 F. 2d 1214 (2d Cir. 1974) vacated as moot ___U.S.___, 95 S. Ct. 2330 (1975) and United States ex rel Haymes v. Montanye, 505 F. 2d 977 (2d Cir. 1974), cert. gr. sub. nom. Montanye v. Haymes ___U.S.___, 95 S. Ct. 2676 (1975).

Questions Presented

1. Were State prisoners deprived of liberty or property by involuntary transfers from one prison to another in a state penal system, or are such transfers within the scope of those liberties withdrawn on sentencing?

2. Did the District Court err in granting plaintiffs' motion for summary judgment where there are disputed issues of fact?

Statement of the Case

A. Prior Proceedings

In a complaint filed January 31, 1975, plaintiffs, all women convicted of felonies and committed by the sentencing courts to the custody of the Department of Correctional Services, and each serving indefinite sentences at the Fishkill Correctional Facility (Women's Unit), brought on action for damages, declaratory and injunctive relief, challenging the conditions at the Fishkill Correctional Facility and the adequacy of the procedures used to transfer these inmates from

Bedford Hills Correctional Facility to Fishkill Correctional Facility. Some of the inmates were transferred on the basis of examinations administered at Bedford Hills, and two of the inmates -- Carol Crooks and Leslie Mason -- were transferred without any examination being administered them. Except with regard to the issue of punitiveness, the conditions at Fishkill and their constitutionality are not an issue on this appeal.

By notice of motion filed April 22, 1975, plaintiffs filed a motion for summary judgement and class certification. Plaintiffs sought to represent a class of "[a]ll women in the custody of the New York State Department of Correctional Services who have been or may be transferred to Fishkill Correctional Facility ..., including those women presently there." (29a*). Plaintiffs motion for summary judgment sought a declaration that all transfers to Fishkill violated plaintiffs' rights under the Eighth and Fourteenth Amendment, and enjoining the Department from transferring any women to Fishkill as well as mandating the return of women there to Bedford Hills Correctional Facility.

On June 26, 1975, the District Court, without issuing findings of fact or conclusions of law,** issued an order which

* Numbers in parenthesis refer to pages of the appendix.

** As is proper under Rule 52(a), F.R. Civ. P. for motions under Rule 56. But see Bose Corp. v. Linnear Design Labs, Inc., 467 F. 2d 304 (2d Cir. 1972); Russo v. Central School Dist. No. 1, 469 F. 2d 623 (2d Cir. 1972), cert. den. 411 U.S. 932 (1973).

certified the class, declared the transfers violative of the Fourteenth Amendment right not to be depr ed of liberty without due process of law, enjoined defendants from sending any member of the class to Fishkill Correctional Facility without according them the procedures required by Newkirk, supra and by Haymes, supra, and enjoined defendants from considering the transfer as bearing on eligibility for release on parole (95a). A timely notice of appeal was filed (97a).

B. Bedford Hills and FishKill Correctional Facilities

At the time the complaint was filed, Bedford Hills and Fishkill were the only two general confinement facilities for adult sane female felons in New York State. For some years prior thereto Bedford Hills was the sole Facility and women were confined there without regard to age and without any attention being paid to their relative incorrigibility, disruptiveness, length of sentence or prior felonious activity. See Crooks v. Warne, ____ F. Supp. ____, (74 Civ. 2351 CLB) (10/1/74, Slip Op. at 4), vac. 516 F. 2d 837 (2d Cir. 1975).

In order to relieve the overcrowding at Bedford Hills, the Department in August, 1974 opened two small facilities -- Parkside and Fishkill. Parkside is a work release facility located in New York City, and Fishkill is a general confinement

facility on the grounds of a corrections complex in Beacon, New York, containing, inter alia, a men's unit, a women's unit and Matteawan State Hospital for the Criminally Insane and a facility for the elderly and infirm.

It is undisputed by the parties that eight of the named plaintiffs were, between August 2, 1974 and December 31, 1974 transferred from the Bedford Hills Correctional Facility to the Fishkill female unit. It was farther undisputed that with the exception of Crooks and Mason, those transferred were selected from the Bedford Hills population because of their poor reading score on an examination administered at Bedford Hills, and that plaintiff Crooks and Mason were transferred because of their claimed inability to function at the Bedford Hills environment.* It is further undisputed by the parties that in no case were plaintiffs afforded any written notice, statement of reasons, hearing, written decision and/or evidence relied upon. What was and remains disputed in the issue of the

* Leslie Mason is a transexual and was while at Bedford Hills kept in the Special Housing Unit there. That Carol Crooks was troublesome must be conceded, even by her. In Crooks v. Warne, supra, the District Court stated of plaintiff (Slip Op. at 23):

> "Clearly, where defendants have had to deal with a highly volatile, contentious and assaultive inmate, previously convicted of manslaughter, who had injured four corrections officers in a subsequent scuffle, it cannot be said with certainty that she no longer poses a clear and present danger to the security of the institution, as well as the safety of the other inmates. This is all the more so in light of plaintiff's repeated outbursts and refusals to comply voluntarily with institutional rules until faced with a show of physical force."

relative conditions at the two prisons regarding cleanliness of the rooms, warmth and patability of the food, the adequacy of the rooms, including appurtenances thereto. In addition, a disputed issue of fact remains concerning the presence of male inmates and correction officers in the womens' unit or the involuntary mixture of men and women at joint activities. While there is no dispute that Fishkill womens' unit was and remains to date closed. There is a dispute as to the Department's future plans for Fishkill female unit.*

POINT I

AS PLAINTIFFS HAVE NO CONSTITUTIONALLY COGNIZABLE LIBERTY OR PROPERTY INTEREST IN THE PLACE IN WHICH THEY ARE IMPRISONED NO PROCESS IS DUE THEM WHEN THEY ARE TRANSFERRED.

A. Property Interests

It is a truism, but nevertheless bears repetition, that before process is due for purposes of the Fourteenth Amendment, the State must seek to deprive the individual of liberty or property. Therefore, as a prerequisite to imposing

* There is also no dispute that the programs available at Bedford Hills were greater than those at Fishkill, but it was argued below that such difference is due not to the different security level of the two prisons but rather due to the fact that Fishkill was a small facility housing only 30 females, and not needing to fill the more diverse needs of a larger, more heterogenous society.

any procedural requirements, whether termed minimal, rudimentary or otherwise, there must be a showing that the deprivation to be visited on the individual is of liberty or property.

The constitution does not define property within its own terms, rather as was stated in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> "Property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." [Emphasis added].

In this regard, plaintiffs' "property" rights are those defined in the Penal Law, the Corrections Law and regulations promulgated by the Commissioner, pursuant to the authority vested in him by the Legislature. See, e.g. Corr. L. § 70. Under the provisions of Penal L. § 70.20, sub'd. 1, persons convicted of felonies for which an indefinite sentence is imposed must be committed.

> "... to the custody of the state department of correction* for the term of his sentence and until released in accordance with the law."

* So in the original. Should probably read state department of correctional services.

According to the practice commentary, this section, derived from former Penal Law § 2180,* while different in form, is no different in substance. Under the former practice the sentencing court committed the defendant to a specific state prison, which had been so designated by the Commissioner in advance. Penal Law § 2198. Corrections L. § 801, subd. 1 with certain exceptions not here pertinent, requires that person committed to the custody of the Department are to be delivered to institutions designated by the commissioner "as receiving and classification centers for the respective judicial districts of the state."** The exceptions, according to the statute are that males, not previously in the commissioner's custody, under 21 at time of sentence are sent to Elmira (Corr. L. § 801, subd. 1[a]); males committed as mental defectives under Corr. L. § 438 are sent to Beacon (Id., subd. 1[b]); and females committed under Corr.

* Repealed L. 1965, c. 1070.

** 7 NYCRR § 103.10 provides that Attica Correctional facility is the receiving center for committing courts in Onondaga, Oswego and Oneida Counties of the Fifth District, as well as all of the Sixth, Seventh and Eighth Districts. Clinton is the receiving facility for males in the Third, Fourth and remainder of the Fifth districts, and Ossining for the First, Second, Ninth, Tenth and Eleventh judicial districts. 7 NYCRR § 103.15 provides that all females are to be received at Bedford Hills. Exceptions are made for mentally defective males [Id. 103.25]; mentally ill males [Id. 103.35] and female [Id. 103.40]; males under 21 [Id. 103.5] and those under death sentences [Id. 103.45].

L. § 451 are to be sent to Albion state training schools. Corr. L. § 801, subd. 2 is specific when it states:

> "Nothing contained in this section shall affect the authority of the commissioner of correction to make appropriate transfers of persons committed to the custody of the department as otherwise authorized by law."*

Correction L. § 23 subd. 1 authorizes the commissioner to transfer inmates from one facility to another, and the superintendent of the sending institution shall take "immediate steps to make the transfer."

In addition, the Commissioner of Corrections is given broad authority to establish, maintain or close correctional facilities, which are to be used as "places of confinement" and "programs of treatment", Corr. L. § 70 subds. 2 and 3(a). A correctional facility must be designated in the rules and identified as to name and location, use for males or females, the age range of inmates and the facility's classification with respect to security level and function, Corr. L. §70, subds. 5 and 6.

* Corr. L. § 801 was repealed by L. 1970 c. 476, § 73. The substance of the statute was transferred to Corr. L. § 71, enacted by the same session law. While Corr. L. § 71 omits the quotation from subd. 2, there was clearly no attempt or implication to create a vested right of assignment at a reception and classification center. See Corr. L. § z, subds. 5 and 10.

The Corrections Law also specifies (§ 70, subd. 4):

> "Two or more correctional facilities may be maintained or established in the same building or on the same premises so long as the inmates of each are, at all times kept separate and apart from each other except that inmates of one may be permitted to have contact with inmates of the other in order to perform duties, receive therapeutic treatment, attend religious services and engage in like activities as specifically provided for in the rules and regulations of the department."

Pursuant to this authority the Commissioner established or maintained twenty-two correctional facilities (aside from correctional camps), 7 N.Y.C.R.R. § 100.5 et seq. With the exception of Bedford Hills, Fishkill Female, and Parkside, all of the Correctional Facilities are to house male prisoners.*

Bedford Hills is described as a facility for females 16 years or older, and is classified as a medium security facility used as a general confinement facility, a reception center, detention center and a work release facility. 7 NYCRR § 100.80. Fishkill Female Correctional Facility was established May 24, 1974, and consisted of two wards of one building of the

* During 1973, the Department had in custody on January 1, 12047 males and 397 females, 50 of whom were at Matteawan State Hospital. In that year there were 6357 men and 229 women committed by the Court and there were 1356 men and 31 women returned for parole or conditional release violations. On December 31, 1973, there were 13,053 men and 384 women under custody. Annual Statistical Report, 1973 Data Inmate & Parole Populations at 8.

Fishkill-Beacon-Matteawan complex. It, like Bedford Hills is a medium security, general confinement facility for females 16 years or older. 7 NYCRR § 100.91(a), (b), (c). The establishing regulation provides however 7 NYCRR § 100.91(d):

> "The inmates of Fishkill Female Correctional Facility shall at all times be kept separate and apart from inmates of Fishkill Correctional Facility, Matteawan State Hospital and Beacon State Institution."

The upshot of the foregoing analysis is that members of plaintiffs' class, each of them having been committed to the custody of the Department of Correctional Services, have no right by statute, understanding or otherwise to be kept at a particular institution, nor is there any bilateral expectation that they be so kept.*

It must be clearly emphasized that the foregoing argument is not a resurrection, in a veiled or other form, of the "now-discredited right-privilege dichotomy" Cardaropoli v. Norton, _____F. 2d _____ (Dkt. No. 75-2005) (September 29, 1975) 2d Cir. Slip Op. 75, at 83 n. 11. It is merely a recognition, sustained time and again by the Supreme Court, that to support a deprivation of property claim, there must be a legitimate claim of

* Cf. United States v. Huss, 520 F. 2d 598, 602 (2d Cir. 1975): ("However, except where specific statutory authority exists, the place and condition of confinement are in the first instance, matters of executive rather than judicial branch authority.")

entitlement to the governmental privilege. That such is the case is made evident by the language in Goss v. Lopez, _____ U.S. _____ 95 S. Ct. 729 (1975) where the Court held that, inter alia, due process attaches to a school suspension case because, through a variety of means, the state made a particular benefit generally available and therefore could not deny it to specific individuals absent a rudimentary form of process. Similarly, in Wolff v. McDonnell, 418 U.S. 539, 557 (1974), stated:

> "But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."*

* While Mr. Justice White spoke in the context of a 'liberty' interest, in Wolff, supra, the same Justice later indicated that he bespoke himself in that regard. In Goss, supra the Court wrote, after analyzing the so-called "property" cases, supported by a "legitmate claim of entitlement," stated (95 S. Ct. at 735):

> "In like vein was Wolff v. McDonald [sic], 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits accumulated under state law, although those benefits were not mandated by the Constitution."

In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that process was due to an inmate whose parole was revoked, even though there was no constitutional right to parole, rather the court focuses on the following (408 U.S. at 479):

> "Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole."

while the Court then proceeds to find a conditional "liberty" interest stemming from the parole, it fails to take cognizance of the fact that unlike property interests, liberty interests stem from the Constitution itself and the granting of a parole creates a property interest, for the individuals; deprivation of liberty stems not from the action of the parole board but from the action of the sentencing court, accompanied by the full panoply of procedural protections. Mr. Justice Douglas, dissenting in part, recognizes that such is the case. He writes (408 U.S. at 493):

> "The Court said in United States v. Wilson, 7 Pet. 150, 161, that a 'pardon is a deed.' The same can be said of a parole, which when conferred gives the parolee a degree of liberty which is often associated with property interests."

In Goss, supra, the court at least implicity recognizes that Morrissey turns on a legitimate claim of entitlement to a particular statutory benefit.95 S. Ct. 735. Absent a legitimate claim of entitlement other than a mere unilateral expectation of the continuation of the status quo, there is no deprivation of property warranting the invocation of the Fourteenth Amendment, Due Process Clause.* See Connell v. Higginbotham, 403 U.S. 207 (1971); Wieman v. Updegraff, 344 U.S. 183 (1952); Arnett v. Kennedy, 416 U.S. 134 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970). See also, Friendly, H., "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1300-1301 (1975); Cardozo, B., The Nature of the Judicial Process 51 (1921).

B. Liberty Interests

Having thus disposed of any property interests accuring to prisoners in the place of their confinement, we proceed to discern what liberty interest they have or have not

* In Richardson v. Belcher, 404 U.S. 78, 80 (1971), the Court wrote:

"In our last consideration of a challenge to the constitutionality of a classification created under the Social Security Act, we held that 'a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment.' Hemming v. Nestor, 363 U.S. 603. The fact that social security benefits are financed in part by taxes on an employee's wages does not in itself limit the power of Congress to fix the levels of benefits or the conditions upon which they may be paid. Nor does an expectation of public benefits confer a contractual right to receive the expected amounts.

been deprived of by virtue of their transfer from one facility designated as medium security to another so designated.**

Defendants concede that if Newkirk v. Butler, supra and Haymes v. Montanye, supra were viable precedents, the constitutional rights would be established. But with all due respect to this Court, neither may be comfortably relied upon.

In Newkirk, supra, the court held that an inmate transferred from Wallkill Correctional Facility to Clinton Correctional Facility suffered a "substantial loss" for which process is due. 499 F. 2d at 1218. The Court implicitly focused on two factors. First Wallkill was a "unique" facility in several respects. The Court continues (499 F. 2d at 1215):

> "Because of its several advantages, which are more fully described in the district court's opinion, see 364 F. Supp. 497 (S.D.N.Y. 1973), admission to Wallkill is generally sought after and usually comes only after a state prisoner has spent time at a maximum security facility."

The Court then proceeds to note a nexus between certain "rumored" activities of the transferees and the transfers

** Defendants recognize, of course, that mere labels are meaningless and that the court should and must pierce the veil and discover the true nature of the change. How, however, the court could do this on mere affidavits, without opportunities afforded to contest them and cross-examine the deponents, especially where opposition is interposed, is not made clear even though the court found it clear "beyond cavil" that conditions at Fishkill Female were substantially harsher than at Bedford Hills, (88a), See, e.g. Carroll v. Sieloff, 514 F. 2d 415, 417 (7th Cir. 1975). See Point II, infra.

themselves. As a result, indeed the District Court declared (499 F. 2d at 1216):

> "'1) plaintiff Newkirk's entered in continuing to be situated at Wallkill is sufficiently great that transfers in direct response to his activity deserves some sort of "due" process, at the very least the knowledge that it is a possibility'...."
> [Emphasis

Three weeks after Newkirk was decided, the Supreme Court decided Wolff v. McDonnell, supra, which distinguishes between loss of good time and solitary confinement on the one hand, and lesser penalties on the other. The Court stated 418 U.S. at 571-572, n. 19:

> "The deprivation of good time and 'solitary' confinement are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be difficult for the purposes of due process to distinguish between the procedures that are required when good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for the imposition of the sanction. We do not suggest, however, that the procedures required by today's decision for the deprivation of good time

> would also be required for the imposition of lesser penalties such as loss of privileges."*

While numerous cases, including Gomes v. Travisono, 490 F. 2d 1209 (1st Cir. 1973) were remanded for reconsideration in light of Wolff, supra, (see Travisono v. Gomes, 418 U.S. 909 [1974]; Palmigiano v. Baxter, 487 F. 2d 1280 [1st Cir. 1973], vac. sub. nom. Baxter v. Palmigiano, 418 U.S. 908 [1974], the Court granted certiorari in Newkirk, supra, cert. granted sub. nom. Preiser v. Newkirk, _____U.S._____95 S. Ct. 172 (1974) and on June 25, 1975, the Court vacated Newkirk and directed that it be dismissed as moot. While the author of the District Court opinion here for review, in Haymes v. Regan, 394 F. Supp. 711, 714, n. 5, noted in another context that the principles enunciated in a case vacated as moot are still binding on the lower courts,** the Supreme Court has held otherwise.

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* Compare in this regard the language in Cardaropoli, supra, at 83-84, n. 12:

> "We do not suggest, therefore, that the procedures required by today's decision must also be observed before a prisoner is subjected to some minor deprivation, 'such as an evening's loss of television privileges.' Wolff v. McDonnell, supra, 418 U.S. at 594 (Douglas, J. dissenting)."

Clearly not the position adopted by the Court's majority.

** United States ex rel. Johnson v. Board of Parole, 500 F. 2d 925 (2d Cir. 1974), vac. sub. nom. Regan v. Johnson, 419 U.S. 1015 (1974).

In United States v. Munsingware, 340 U.S. 36, 39-40 (1950), the Court stated that the duty of the appellate court to vacate or reverse the judgment below and remand with directions to dismiss as moot, has the effect of "clearing" the path for future relitigation of the issues" so that "none is prejudiced by a decision which in the statutory scheme was only preliminary." See, in this regard Neil v. Biggers, 409 U.S. 188, 192 (1972); Durant v. Essex Co., 7 Wall. 107, 112 (1869); Mechling Barge Lines v. United States, 386 U.S. 324, 329, n. 11 (1961).

In Leader v. Apex Hosiery Co., 108 F. 2d 71, 81 (3d Cir. 1939), aff'd 310 U.S. 469 (1940), the Court wrote:

> "The decree of this Court in Apex Hosiery Co. v. Leader ... [90 F. 2d 455] was reversed by the Supreme Court with directions to dismiss the complaint since the ase was moot.... The decree of this Court in the injunction proceeding must therefore be considered as having been vacated. It is no longer binding as precedent, as law of the case, or as res judicata .... As a consequence we are at liberty to consider anew all questions presented by the record of the case at bar."

See also South Spring Hill Gold Co. v. Amador Gold Co., 145 U.S. 300 (1892); Brownlow v. Schwartz, 261 U.S. 216 (1923).

In United States ex rel Haymes v. Montanye, 505 F. 2d 977 (2d Cir. 1974), the Court held that transfer intended to "reprimand, deter or reform an individual" must be accompanied by procedural due process, both from an equal protection and due process point of view. Haymes, supra, 505 F. 2d 980-981. The Supreme Court has however granted certiorari in Haymes, sub. nom. Montanye v. Haymes, _____U.S._____, 95 S. Ct. 2676 (1975). While this does not necessarily indicate that the Court will reverse, it does mean that this Court's decision is not final, and should be relied upon, if at all, only gingerly. United States v. Munsingware, supra.

In analyzing the liberty interests of plaintiffs, it is helpful to remember that plaintiffs' constitutional rights to liberty were withdrawn after conviction of crimes and upon which they were duly sentenced to the custody of the department. It must also be remebered that for those prisoners sentenced to indeterminate terms, the norm is a maximum security prison

until released on parole.* It is only female prisoners who are originally sent to medium security prisons. It can hardly be said that admission to Bedford Hills by those qualified to be sent there, is eagerly "sought after" Newkirk, supra, 499 F. 2d at 1215. The only aspect of Bedford Hills that makes it unique, is that it is populated by females.

In Newkirk, supra, the court found, relying on Joint AntiFascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), that an inmate transferred from a medium to a maximum security facility suffers a "grievance loss." See Palmigiano v. Baxter, supra, 487 F. 2d at 1284 vac. 418 U.S. 908, on remand 510 F. 2d 534 (1st Cir. 1975), cert. granted sub. nom. Baxter v. Palmigiano, _____U.S.____ 95 S. Ct. 2414 (1975); Gomes v. Travisono, 510 F. 2d 537 (1st Cir. 1974).

* Indeed, the Court found in Newkirk, supra, that Wallkill is a "unique" facility to which admission is granted only after the inmate has spent time at a maximum security prison and gone through careful screeing.

In this regard, however, it is insufficient to find that a grievous loss triggers the operation of the due process clause. This was made clear in Morrissey, supra, where the Court wrote, 408 U.S. at 481:

> "The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."

See Fuentes v. Shevin, 407 U.S. 67 (1972); compare Newkirk, supra at 1217.

Plaintiffs here complain they by virtue of their transfer, lost job opportunities, nice cell conditions, program activities, etc. It is significant to note, however, that with two exceptions, none of plaintiffs' class alleged or proved that they took advantage of any of these more expansive educational programs.* As to plaintiffs Crooks and Mason, at the time of transfer, one was housed in Special Housing, the other was in punitive segregation, pending charges. (36a).

* Unlike the plaintiff in Haymes, supra, plaintiffs here were, at all times represented by counsel. Therefore their complaint should not be as liberally construed as that in Haymes. See Haines v. Kerner, 404 U.S. 519 (1972).

The Courts' have long since expressed the notion that judges, skilled in the law should walk gingerly in dealing in the operations of prisons for they are not skilled in penological techniques. Sostre v. McGinnis, 442 F. 2d 178, 189 (2d Cir. 1971). The Court there, recognized, as does the Court in Wolff v. McDonnell, supra, 418 U.S. at 555, that "the constitutionally protected freedoms enjoyed by citizens-at-large may be withdrawn or constricted so far as justified by the consideration underlying our penal system." See Price v. Johnston, 334 U.S. 266, 285 (1948). Nowhere has it ever been indicated that the right to a particular level of custody, or particular trade or occupation or residence in a particular facility or cell block (cf. Miliken v. Bradley, 418 U.S. 717, 740-741 [1974]; San Antonio School District v. Rodriguez, 411 U.S. 1 [1973]; Spencer v. Kugler, 404 U.S. 1027 [1972]; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24 [1971]); is within the retracted freedoms that a prisoner carries with him when he enters a prison. It is not a "preferred" right such as the right to correspond and have assistance of counsel Procunier v. Martinez, 416 U.S. 396 (1974); Morgan v. LaVallee, _____F. 2d_____ (Dkt. No. 75-2044, Oct. 14, 1975) (2d Cir. Slip Op. 191, 196). There is no allegation of racial or

or religious discrimination or impairment of these rights. Cooper v. Pate, 378 U.S. 546 (1964); Lee v. Washington, 390 U.S. 333 (1968). Nor is there any burden on a prisoner's access to courts implicit in the transfer. Johnson v. Avery, 393 U.S. 483 (1969); Ex Parte Hull, 312 U.S. 546 (1941).

Indeed, if anything, the withdrawal of the right to live where one chooses, or with whom one chooses, or to work at a chosen profession, or to receive particular education and training is implicit in a sentence to a term of imprisonment and is why we surround such a sentence with the full panoply of procedural rights unique to criminal jurisprudence. See Morrissey v. Brewer, supra; Argersinger v. Hamlin, 407 U.S. 25, 40 (1972); Rhem v. McGrath, 507 F. 2d 333 (2d Cir. 1974); Morgan v. LaVallee, supra at 198. A transfer, moreover, unlike a denial of "good time" works no extension of the term in prison or a loss of reputation and standing in the community. Board of Regents v. Roth, supra; Goss v. Lopez, supra. Thus, to say that a prisoner transferred between facilities suffers a grievous loss is insufficient to invoke procedural due process unless, as has nowhere been heretofore made clear, it is established that the loss suffered goes to liberty or property. The suffering of a grievous loss goes only to establish the "weight" not the nature. In Goss, supra, the Court held,

95 S. Ct. at 737:

> "The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellee's argument is again refuted by our prior decisions; for in determining 'whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake.' Board of Regents v. Roth, supra, at 570-571, 92 S. Ct. at 2705-2706. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind."

See Fuentes v. Shevin, supra; Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

It would appear clear therefore, if respect is to be paid to the notion that incarceration necessarily brings with it the retraction of liberties enjoyed by citizens at large, involuntary transfers come within those liberties not enjoyed by inmates. As this Court stated in Haymes, supra, 505 F. 2d at 979-980:

> "We do not disagree with the assertion that not every inmate who must endure the burden alleged by Haymes deserves the full panoply of procedural armor. Removal of inmates to other facilities may be justified by any number of concerns quite proper to the administration of prison systems. One scarsely needs to be reminded of the sad events at Attica prison three years ago to understand the explosive potential flowing from the lamentable conditions which confront many prisoners. Although such circumstances neither excuse the need for reform nor justify sacrificing the inmate on the altar of security, they may on occasion render it necessary to take summary action to avert imminent riot. Overcrowding and the not unrelated hazards to health may also call for a prompt response by prison authorities."

In Wolff, supra, the Court took cognizance of the nature of disciplinary proceedings in prisons, recognizing (418 U.S. at 561-562).

> "Prison disciplinary proceedings take place in a closed, tightly controlled environoment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are many

> varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock."

The upshot of the foregoing discussion demonstrates that inherent in the needs underlying our prison system is the need for flexibility in moving prisoners from one place to another and that an inmate loses, by virtue of his conviction any right he may previously have enjoyed to choose or control where he lives. There is therefore no deprivation of liberty as their is no deprivation of property, no matter how broadly defined, extant in a transfer from one prison to another in a correctional system.*

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* Defendants have not, in this memorandum dealt with the decision in Haymes as it would be, in light of the fact that Haymes and the principles underlying it will be fully explored by the Supreme Court, this term, presumptuous for us to do so. We note however, that with regard to Haymes, where inmates are transferred for an inability to adjust, resulting from adjudications at prior disciplinary proceedings, the Court, in Wolff, supra, noted, 418 U.S. at 565 that the results of disciplinary proceedings might without more, furnish a basis for a finding of incorrigibility and transfer and implicitly approved such a practice."

POINT II

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS WHERE THERE WERE CONTESTED ISSUES OF FACT.

The District Court, despite the objections interposed to plaintiffs' Rule 9(g) statement, granted summary judgment to plaintiffs. In so doing, the Court denied defendants what itself found that defendants had denied plaintiffs--their day in court. The only basis upon which then, conceivably, the Court below could justify the find was either that transfers between prisons, whatever, the motive, were per se a violation of due process; a position this Court has clearly rejected;* or that the undisputed facts made the transfers per se punitive because the conditions at Fishkill were substantially harsher than at Bedford Hills.

While the Court below found, apparently, on the basis of the affidavits submitted by plaintiffs (38a-68a), that it was "clear beyond cavil" that the conditions at Fishkill were substantially harsher than at Bedford Hills, it failed to focus on exactly what, at Fishkill, made it harsher (88a). The

* United States ex rel Haymes v. Montanye, supra, 505 F. 2d at 979-980.

constitution and this court's decisions recognize that each prison, especially in a multi-prison system such as New York's is different from one another. Each prison occupies a particular piece of land, each prison has its own staff, the inmates are different, the physical plant is different, and to a large extent the programs are different at each prison.*

In Carroll v. Sieloff, supra, the Court stated the proper disposition, assuming the viability of cases such as Newkirk and Haymes, supra. The Court wrote 514 F. 2d at 417:

> "Whether ... [the prisoners] suffered a grievous loss as a result of the transfer, in light of this record, depends upon an inquiry into the actual differences between the two institutions at the time of the transfer, the bases for their segregation at Stateville, and whether the facts thus determined reflect such substantial deprivations as to have required at least minimum due process."

The District Court, accepting at face value, the disputed allegations contained in plaintiffs' 9(g) statement, have not made the required inquiry.

*See summary, 1974 Annual Report, Department of Correctional Services, 14-20 (1974).

Judge Frank, writing for himself, Judge Chase and Leonard Hand, thirty years ago, in Doehler Metal Furniture Co. v. United States, 149 F. 2d 130, 135 (2d Cir. 1945), stated:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgments. A litigant has a right to trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay.... The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered." [footnote omitted].

See also Arenas v. United States, 322 U.S. 419, 429, 433 (1944); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624 (1944)*

In the leading copyright infringement case, Arnstein v. Porter, 154 F. 2d 464, 470-471 (2d Cir. 1946), Judge Frank inferred that even where the affidavits are persuasive of the

*A warning recently reiterated in Heyman v. Commerce and Industry Insurance Co., ___ F. 2d ___ (Dkt. No. 75-7230) (2d Cir. Oct. 24, 1975).

issue, the question of credibility will make summary judgment inappropriate. He concludes:

> "We think that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at a trial, especially as to matters peculiarly within defendant's knowledge."

See also Bonzant v. Bank of New York, 156 F. 2d 787, 790 (2d Cir. 1946); Colby v. Klune, 178 F. 2d 872 (2d Cir. 1949); Fogelson v. American Woolen Company, 170 F. 2d 660 (2d Cir. 1948); Pentel v. American Telephone & Telegraph, 13 FRD 249 (S.D.N.Y. 1952).*

Summary judgment is particularly inappropriate in cases involving important public issues of constitutional law. Such was the sentiment expressed in Hess v. Schlesinger,

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* Appellants here do not contend that bare pleadings alone and reliance upon them foreclose summary judgment, for they recognize that stubborn reliance on pleadings is insufficient. Rather, it is argued that when issues of fact crucial to to decision remain and are supported by affidavits, summary judgment is inappropriate. See Rule 56(e), F.R. Civ. P.; Dressler v. MV Sandpiper, 331 F. 2d 130, 132-133 (2d Cir. 1964); Waldron v. Cities Service Oil Co., 38 FRD 170 (S.D.N.Y. 1965), aff'd 361 F. 2d 671 (2d Cir. 1966). See Adickes v. Kress & Co., 398 U.S. 144, 159 n. 20 (1970), as to the discussion of the purpose of Rule 56(e) merely to foreclose relying on allegations contained in a well pleaded complaint.

486 F. 2d 1311 (D.C. Cir. 1973); and Arrington v. City of Fairfield, 414 F. 2d 687 (5th Cir. 1969).

The rule, as set forth in Adickes v. Kress, supra, is still the appropriate one. As the Court there stated 398 U.S. at 157, 158-159:

> "As the moving party, respondent had the burden of showing the absence of a genuine issue of material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party. [footnote omitted]
>
> * * *
>
> Becuase '[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion.' United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

See also First National Bank v. Cities Services Co., 391 U.S. 253 (1968); Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962).

CONCLUSION

FOR THE REASONS STATED ABOVE THE DECISION OF THE COURT BELOW SHOULD BE REVERSED AND JUDGMENT ENTERED FOR DEFENDANTS OR THE CASE REMANDED FOR TRIAL.

Dated: New York, New York
October 28, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Rosalba Federici , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On the 28th day of October , 1975 , she served the annexed upon the following named persons:

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Attorneys in the within entitled Action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Rosalba Federici

Sworn to before me this
28th day of October , 1975

Assistant Attorney General
of the State of New York